NO. 86-2064

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DANNY PIPES AND CHARLES PAYNE,

Petitioners,

-v-

STEVE BENNY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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Respondent, in his opposing brief in No. 86-2064, argues that the petition "neglects to set forth considerations governing the issuance of an extraordinary writ" and "fails to establish any special and important reasons for granting the writ." Brief in Opp., p.1. In reply,

petitioners submit that their petition clearly reflects that they are seeking review of a judgment and opinion of the United States Court of Appeals for the Ninth Circuit. Consequently, the appropriate jurisdictional statute is 28 U.S.C. §1254 (1).[1/] Furthermore, their petition shows the decision below to be erroneous and in conflict with decisions of this Court and with decisions of several of the courts of appeals. Finally, their petition suggests that the issue presented is sufficiently important for this Court to review.

A resolution of this issue will have actual and practical benefits

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1/ Petitioners' reliance upon 28 U.S.C. §1254 (1) is obvious from the text of their petition and from the fact that they cited it in their Application for an Extension of Time. See App. A.

for innumerable litigants and for an over-burdened federal judiciary.[2/] A definitive decision from this Court excluding such trivial torts as those involved in this case from 42 U.S.C. §1983 coverage will promote a more effective federal judiciary. Federal courts have enough business of their own without handling state tort cases. State courts

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2/ Constitutional claims by prisoners are being presented to federal courts in ever incresing numbers; e.g., "18,856 [Bivens and §1983 prisoner] suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975." Cleavinger v. Saxner, 106 S.Ct. 496, 506 (1985) (Rehnquist, J., dissenting), citing Administrative Office of the United States Courts, Annual Report of the Director 143, Table 24 (1984).

A computer search on LEXIS by petitioners' counsel disclosed that reference to 42 U.S.C. §1983 appeared in 60 reported cases of this Court and in 4280 reported cases of the courts of appeals and district courts during the two year period August 1, 1985 to July 31, 1987.

can and do provide adequate remedies for common law torts. Simple assault and battery does not violate the Constitution simply because the victim is a prisoner. But allowing such trivial torts to masquerade as constitutional violations diminishes the federal courts' capacity to deal with the more substantial matters within their jurisdiction. The time has come to realign case loads.

Next, respondent argues that the manner in which petitioners raised the Parratt argument in the court below precludes their raising it with this Court. Brief in Opp., p.3. The short answer to this contention is that regardless of whether the Parratt issue was properly raised below,[3/] it is an

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3/ See App. B.

issue of subject matter jurisdiction, and if petitioners are correct in asserting that the Parratt doctrine extends to minor deprivations of liberty like those in this case, then the district court lacked jurisdiction to entertain respondent's Complaint and that fact can be raised for the first time in this Court. See Bender v. Williamsport Area School Dist., ___ U.S.____, 106 S.Ct. 1326, 1331 (1986) and City of Kenosha v. Bruno, 412 U.S. 507, 511-513 (1973). See also Rule 12(h)(3), Fed.R.Civ.P.

Respondent also raises the argument that since petitioners were defaulted they "cannot now complain about the court's rulings." Brief in Opp., p.3. Petitioners concede that the allegations of the Complaint must be accepted as true because of the default. They assert, however,

that even when the allegations of the Complaint are accepted as true they still do not add up to make out a cognizable claim under 42 U.S.C. §1983 and that petitioners are entitled to demonstrate this insufficiency on appeal. See Thompson v. Wooster, 114 U.S. 104 (1885) and Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978). If the Complaint is deficient, as petitioners contend, then there can be no judgment, default or otherwise.

Finally, respondent argues that the Complaint is sufficient to state a claim under §1983 because it alleges both a violation of substantive due process and the Eighth Amendment. However, only the

Eighth Amendment argument is relevant.[4/] In support of his Eighth Amendment argument, respondent cites several cases in which the complained of conduct "shocks the conscience." In contrast, the only thing shocking about our case is that the Ninth Circuit could so cavalierly conclude that the commonplace, innocuous incidents of minor tortious conduct alleged in respondent's Complaint rise to the level of constitutional violations. No other court of appeals has elevated such trivial torts to constitutional status. The Ninth Circuit (and other courts of appeals)

4/ This Court made it clear in Whitley v. Albers, ____U.S.____, 106 S.Ct. 1078, 1088 (1986), that prisoners could not successfully sustain a claim for violation of substantive due process unless the complained of conduct was egregious enough to constitute a violation of the Eighth Amendment.

opinions cited in support of the decision in this case all involved much more brutal behavior.[5/] Indeed, simple assault and battery had previously been denied constitutional status by the Ninth Circuit.[6/] Its decision, in this case, that the Constitution is offended whenever prison guards stand by while one prisoner hits or kicks another is clearly erroneous.

5/ Gaut v. Sunn, 792 F.2d 874 (9th Cir. 1986); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973); Norris v. District of Columbia, 737 F.2d 1148 (D.C.Cir. 1984); and Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986).

6/ "That the effect of our holding is to relegate appellant to his tort law remedy under Arizona law for Kush's alleged assault and battery should surprise no one." Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), aff'd on other grounds sub nom. Kush v. Rutledge, 460 U.S. 719 (1983).

This Court cannot allow this wrong decision to stand.[7/] The federal courts are already being overwhelmed by too many §1983 cases of questionable merit. The Ninth Circuit's opinion in this case opens the federal courthouse door even wider. Entertaining trivial torts as purported §1983 claims puts unnecessary strain on the federal courts and on federal/state relations. Torts belong in state courts, not federal courts. State courts have now demonstrated that they are willing and able to decide these cases on either

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7/ Apparently the fact that this Court can review only about 1% of the decisions of the courts of appeals puts insufficient pressure on some panels of the Ninth Circuit to decide §1983 cases correctly. Unfortunately, the consistency with which the Ninth Circuit is reversed by this Court hasn't cooled its compulsion to decide cases on the outside of the outer bounds of §1983. This is one of those cases.

federal constitutional or state law grounds. For these reasons plenary review of the action below is needed. The petition should be granted.

Respectfully submitted,

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August 17, 1987

APPENDIX A

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANNY PIPES and CHARLES PAYNE, Petitioners,
v.

STEVE BENNY, Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Petitioners Danny Pipes and Charles Payne pray for a 30-day extension of time to file their petition for

certiorari in this Court to and including June 9, 1987. The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was filed on February 9, 1987, and petitioners' time to petition for certiorari in this Court expires May 11, 1987. This application is being filed more than 10 days before that date.

Copies of the judgment appealed from and the opinion below are attached hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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APPENDIX B

PAGE 14 OF
APPELLANTS' OPENING BRIEF
IN THE NINTH CIRCUIT

Plaintiff's complaint alleges separate incidents of wrongful conduct on the part of the defendants, i.e., an assault upon him by defendant Pipes and the failure of defendants Pipes and Payne to protect him from other prisoners. The assault is alleged in the complaint in these terms:

> One of the administrative segregation prisoners made a threatening gesture with his fist to hit Steve Benny and the fight was on. Steve Benny was holding his own until CSO Danny Pipes raised the iron panel crank that is used to open and clsoe [sic] the cell doors, and swung it at Steve Benny, which caused Steve Benny to back up in order to not be hit by the iron crank.
>
> CSO Danny Pipes held the iron bar above his head in a striking position towards Steve Benny's head while handcuffing him and used abusive force as he (Pipes) removed Steve Benny from the Able Run area. ER 4-5.

At best, plaintiff has alleged a cause of action for tort which could and should be brought in state court.[5/] Not every assault by a law enforcement officer constitutes a S 1983 violation. Bates v. Westervelt, 502 F.Supp. 94 (S.D.N.Y. 1980). See also Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983); Johnson v. Glock, 481 F.2d 1028, 1033 (2d Cir.

5/ See Ingraham v. Wright, 430 U.S. 561 (1977); Parratt v. Taylor, 451 U.S. 527 (1981); and Daniels v. Williams, 748 F.2d 229 (1984), cert. granted, 105 S.Ct. 1168 (1985).